STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS ALLEN DHAESE,

Defendant-Appellant.

UNPUBLISHED
October 1, 2009

No. 284768
St. Joseph Circuit Court
LC No. 07-014400-FC

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant Thomas Allen Dhaese was convicted of two counts of first-degree criminal sexual conduct with a person under the age of 13, MCL 750.520b(1)(a). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 40 to 60 years' imprisonment for each of his two criminal sexual conduct convictions. Defendant appeals as of right. We affirm.

Defendant concedes that the trial court properly followed *People v Watkins*, 277 Mich App 358, 362; 745 NW2d 149 (2007), and permitted testimony by two witnesses about prior acts of sexual abuse perpetrated by defendant pursuant to MCL 768.27a. Defendant nevertheless argues, contrary to *Watkins*, that MCL 768.27a is a substantive rule of evidence that conflicts with MRE 404(b) and intrudes on the Michigan Supreme Court's powers to control practice and procedure in the Michigan courts. Defendant raises this issue on appeal because the Michigan Supreme Court initially granted leave to appeal *Watkins, supra*. See, *People v Watkins*, 480 Mich 1167; 747 NW2d 226 (2008). However, the Supreme Court subsequently vacated that order and denied leave to appeal. *People v Watkins*, 482 Mich 1114; 758 NW2d 267 (2008). Thus, we remain bound by this Court's previous decision in *Watkins*, *supra.* MCR 7.215(J)(1).

Defendant next alleges that the prosecutor engaged in several instances of misconduct during closing argument. These issues are unpreserved for appeal, and therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). Defendant first challenges the prosecutor's statement "I stand by what [the victim] says . . . I come here this morning and ask all of you to stand by what [the victim] says because she's absolutely telling the truth." A prosecutor's comments during a closing argument are "reviewed in context to determine whether they constitute error requiring reversal." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). In general, prosecutors are given great latitude to "argue the evidence and all reasonable inferences from the evidence as

it relates to [their] theory of the case." *Id.* at 282. "A prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness, however, the prosecutor may argue from facts that a witness should be believed." *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005) (citations omitted). A review of the challenged comment in context reveals that the prosecutor never suggested that he had special knowledge as to the victim's truthfulness. *McGhee, supra* at 630. However, the prosecution's comment was ill advised where it could be viewed as expressing a personal opinion about whether the victim was telling the truth. Regardless, reversal is unwarranted because the trial court gave a curative instruction immediately following the prosecutor's closing argument and again reminded the jury that it was the sole judge of witness credibility during its final instructions before the jury began its deliberation. "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions." *People v Unger (On Remand)*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (citations omitted); see also, *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005) ("Nevertheless, to the extent the statements could have been considered improper vouching, the court's admonition and its instruction to the jurors that it was their responsibility to determine witness credibility were sufficient to cure any prejudicial effect from any error."); *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996) ("[T]he mere statement of the prosecutor's belief in the honesty of the complainant's testimony did not constitute error requiring reversal because, as a whole the remarks were fair. In any case, a prompt admonishment to the jury regarding its role as factfinder would have cured any error.").

Defendant also contends that the prosecutor engaged in misconduct by enlisting other witnesses to comment on the credibility of the victim. Defendant cites *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), which asserts that witnesses are not to comment on or be asked about the credibility of other witnesses to support his argument. However, his reliance on this case is misplaced. While it is true that "it [is] improper for the prosecutor to ask [a witness] to comment on the credibility of prosecution witnesses," *Buckey, supra* at 17, that did not occur here. Thus, defendant has failed to establish factually that the prosecution engaged in misconduct in this manner.

Defendant next asserts that the prosecutor improperly argued facts not in evidence during closing argument, by suggesting that three witnesses "stood by" the victim's allegations. We disagree. "Prosecutors cannot make statements of fact unsupported by the evidence, but remain free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. The prosecutor's comments must be considered as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Our review of the record reveals that the prosecution permissibly stated a reasonable inference that the testimony of the three witnesses supported the victim's allegations. The prosecution was not limited to the blandest language possible, but rather had "wide latitude" to argue a reasonable and common-sense inference from the testimony presented at trial. *Bahoda, supra* at 282; *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Further, we recognize that the trial court appropriately issued a curative jury instruction to extinguish any possible prejudice. *Unger (On Remand), supra* at 235; *McGhee, supra* at 633; *McElhaney, supra* at 284.

Defendant argues additionally that he was denied the effective assistance of counsel because his trial counsel failed to object to the above-discussed instances of prosecutorial misconduct. To prevail on a claim of ineffective assistance of counsel, defendant must prove two components: 1) deficient performance, and 2) prejudice. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). "Because defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Carbin*, *supra* at 600. Here, however, the record does not support any meritorious contention of prosecutorial misconduct, particularly in light of the curative instructions provided, and consequently, defendant has failed to establish the factual predicate for his claim that his counsel was ineffective for failing to object to this alleged misconduct. *Id*.; see also, *People v Craig Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008) ("It is well established that defense counsel is not ineffective for failing to pursue a futile motion."); *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003) ("Defense counsel is not required to make a meritless motion or a futile objection.").

Defendant also challenges the trial court's scoring of three offense variables (OVs). A trial court has discretion in scoring the OVs, and this Court will uphold a trial court's scoring decisions if there is any evidence to support the scores given. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We conclude that there was evidence in the record to support the trial court's scoring decisions, and therefore, that defendant's assertion of error in this regard lacks merit.

More specifically, defendant first contends the trial court misscored OV 3, MCL 777.33, at five points because there was no evidence defendant physically injured the victim. Because defendant affirmatively approved of this score at trial, he has waived this issue. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Even were we to consider the argument, however, defendant would not prevail. MCL 777.33(1)(e) provides that five points are to be scored if "[b]odily injury not requiring medical treatment occurred to a victim[.]" The record indicates that the victim suffered pain as a result of the sexual abuse perpetrated on her by the defendant. Because pain is generally indicative that a bodily injury occurred, there was sufficient evidence to support the trial court's decision. *Endres*, *supra*.

Next, defendant argues the trial court misscored OV 10, MCL 777.40, addressing exploitation of a vulnerable victim, at 15 points because there was no evidence defendant engaged in predatory conduct. MCL 777.40(3)(a) defines "predatory conduct" as "preoffense conduct directed at a victim for the primary purpose of victimization." "Both the timing and the location of an assault are factors of predatory conduct before the offense, which conduct includes watching a victim and waiting for any chance to be alone with her at a separate location." *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004). When determining whether the trial court properly scored OV 10, this Court considers the following analytical questions:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?

(3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?

If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. [*People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008).]

The record indicates that defendant created a close relationship with the young victim and engaged in preoffense behavior specifically directed at the victim, watching the victim and waiting to isolate her from others in the household. Further, defendant engaged in this behavior for the purpose of victimizing the victim. Thus, the trial court's scoring decision is supported by evidence in the record. *Cannon*, *supra* at 162. See also *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003) ("[I]t may be inferred from the evidence that defendant *watched* his victim and *waited* for any opportunity to be alone with her in an isolated location. On the basis of this evidence, the trial court's scoring of OV 10 at 15 points for predatory conduct was not clearly erroneous.").

Finally, defendant contends the trial court clearly erred when it scored OV 19, MCL 777.49, at ten points, because there was no evidence that defendant interfered with someone who administers justice. However, OV 19 may be scored at ten points where there is evidence that "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). "Conduct that occurs before criminal charges are filed can form the basis for interference, or attempted interference, with the administration of justice, and OV 19 may be scored for this conduct where applicable." *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). Defendant's act of instructing the victim that the abuse was a secret was an affirmative act to prevent investigation and prosecution of his crimes. Thus, the trial court did not clearly err when it scored OV 19 at ten points. *Id*.

We affirm.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra